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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

7 MARCO MARROQUIN,

8 Petitioner,

No. C 07-6098 PJH (PR)

9 vs.

10 BEN CURRY,

11 Respondent.

**ORDER GRANTING  
RESPONDENT'S MOTION TO  
DISMISS; DISMISSAL WITH  
LEAVE TO AMEND**

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13 This is a habeas case filed pro se by a state prisoner. It formerly was assigned to  
14 Judge Martin Jenkins and now has been reassigned to the undersigned. Respondent has  
15 responded to the order to show cause with a motion to dismiss the petition as mixed, and  
16 petitioner has opposed the motion. For the reasons set out below, the motion will be  
17 granted.

**DISCUSSION**

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19 The grounds for relief which petitioner included in his federal petition were that:  
20 (1) he has a liberty interest protected by due process in being found suitable for parole; (2)  
21 the Board violated his right to due process in their application of 15 California Code of  
22 Regulations §§ 2400-2411 to "over-ride" California Penal Code § 3041(a),(b); (3) the Board  
23 violated his right to equal protection by failing to consider setting his term and failing to fix a  
24 primary term; (4) the Board violated his right to due process when they denied parole  
25 based on the facts of his commitment offense; (5) the Board violated his right to due  
26 process by denying parole based on a "predetermined outcome;" and (6) the Board violated  
27 his right to due process by holding parole suitability hearings for a foreign national subject  
28 to deportation, such as petitioner. Respondent contends that only the fourth issue is

1 exhausted, making this a mixed petition.

2 An application for a federal writ of habeas corpus filed by a prisoner who is in state  
3 custody pursuant to a judgment of a state court may not be granted unless the prisoner has  
4 first exhausted state judicial remedies, either by way of a direct appeal or in collateral  
5 proceedings, by presenting the highest state court available<sup>1</sup> with a fair opportunity to rule  
6 on the merits of each and every issue he or she seeks to raise in federal court. See 28  
7 U.S.C. § 2254(b),(c); *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). Petitioner has the  
8 burden of pleading exhaustion in his or her habeas petition. See *Cartwright v. Cupp*, 650  
9 F.2d 1103, 1104 (9th Cir. 1981).

10 The United States Supreme Court held in *Rose v. Lundy*, 455 U.S. 509 (1982), that  
11 federal courts must dismiss a habeas petition which contains one or more unexhausted  
12 claims. *Id.* at 522 (1982). If the petition combines exhausted and unexhausted claims,  
13 *Rose v. Lundy* requires dismissal of the entire habeas petition without reaching the merits  
14 of any of its claims. *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988). However, the rule  
15 is not as absolute as might first appear. *Rose* itself provides that the dismissal must be  
16 with leave to amend to delete the unexhausted claims; if they are deleted, the court can  
17 then consider those which remain. See *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir.  
18 2000). And there are two other exceptions: One is that when the petition fails to raise even  
19 a colorable federal claim, it may be denied even if it is partly or entirely unexhausted, 28  
20 U.S.C. § 2254(b)(2), and the other is that rather than dismiss, the court may stay a mixed  
21 petition to allow the petitioner to return to state court to exhaust the unexhausted issue or  
22 issues, *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005).

23 Petitioner's state habeas petition was denied in the California Court of Appeal.

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25 <sup>1</sup> In California, the supreme court, intermediate courts of appeal, and superior courts  
26 all have original habeas corpus jurisdiction. *Nino v. Galaza*, 183 F.3d 1003, 1006 n.2 (9th Cir.  
27 1999). Although a superior court order denying habeas corpus relief is non-appealable, a state  
28 prisoner may file a new habeas corpus petition in the court of appeals. *Id.* If the court of  
appeals denies relief, the petitioner may seek review in the California Supreme Court by way  
of a petition for review, or may instead file an original habeas petition in the supreme court.  
*Id.* at 1006 n.3.

1 Petitioner then petitioned for review in the California Supreme Court. Respondent  
2 contends that the petition for review was insufficient to "fairly present" any of petitioner's  
3 issues except his fourth issue.

4 The exhaustion requirement is satisfied only if the federal claim has been "fairly  
5 presented" to the state courts. *Crotts v. Smith*, 73 F.3d 861, 865 (9th Cir. 1996). A claim is  
6 "fairly presented" only if the petitioner either referenced specific provisions of the federal  
7 constitution or federal statutes, or cited to federal or state case law analyzing the federal  
8 issue. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003) (en banc). The specific  
9 factual basis of the federal claim also must be presented to the highest state court. *Kelly v.*  
10 *Small*, 315 F.3d 1063, 1067-69 (9th Cir. 2003), *overruled on other grounds*, *Robbins v.*  
11 *Carey*, 481 F.3d 1143, 1148 (9th Cir. 2007) (finding unexhausted ineffective assistance of  
12 counsel and prosecutorial misconduct claims where specific instances of ineffectiveness  
13 and misconduct asserted in federal petition were neither in the California Supreme Court  
14 petition nor discussed by the court of appeal).

15 In the form portion of his petition for review in the California Supreme Court  
16 petitioner listed his first ground as "Due process and equal protection violations; see  
17 attached petition." Ex. 1 at 3. In the subsections of ground one calling for "[s]upporting  
18 facts" and "[s]upporting cases...", he wrote "[s]ee attached petition and Motion for Judicial  
19 Notice attached hereto." *Id.* For ground two, he wrote exactly the same thing as in ground  
20 one. *Id.* at 4.

21 It therefore is clear that the issue which was presented in the attached typed  
22 document headed "Petition for Review in the Supreme Court of California" is exhausted. In  
23 that document petitioner contended that the circumstances of his offense did not, given the  
24 passage of time, constitute "some evidence" to support the denial of parole. *Id.* at  
25 (attachment) 3. This is his fourth issue here, the one that respondent concedes is  
26 exhausted.

27 But what of the other five issues? The non-form attachment "Petition for Review in  
28 the Supreme Court of California" came to an end after presenting issue four. Page six of

1 that attachment carries petitioner's signature. Following that is an unlabeled minute order  
2 from the superior court denying a state petition, then a document headed "California Court  
3 of Appeals [sic][;]<sup>2</sup> Second Appellate District." In it petitioner states that he "herein appeals  
4 to the [California Court of Appeal]," and complains about the superior court's decision. It  
5 ends with a signature line on page five. Following *that* is another document, without any  
6 indication of what court it was filed in, headed "To the Honorable Judges" and listing the six  
7 issues raised here. None of these attachments is labeled "exhibit."

8 Respondent's argument is that the petition for review did not fairly present the other  
9 five issues when they were only contained in an attachment as described above, an  
10 attachment which appears to have been intended as an exhibit rather than as part of the  
11 petition for review itself. Ordinarily a state prisoner does not fairly present a claim to a state  
12 court if that court must read beyond a petition or a brief (or a similar document) that does  
13 not alert it to the presence of a federal claim in order to find material that does so. *Baldwin*  
14 *v. Reese*, 541 U.S. 27, 30-34 (2004). Although the court is sympathetic to petitioner's  
15 difficulties in coping with the complexities of habeas procedure, the fact remains that the  
16 state supreme court would not have thought, in looking at his petition for review, that he  
17 was raising any issues other than the "some evidence" one. The remaining five issues are  
18 unexhausted. Respondent's motion will be granted and petitioner will be afforded an  
19 opportunity to choose among three possible courses for the further conduct of the case.

## 20 CONCLUSION

21 1. Respondent's motion to dismiss (document number 4 on the docket) is

22 **GRANTED.**

23 2. Petitioner may chose from three possible courses of action: (1) he may dismiss  
24 this petition with an eye to exhausting and then filing another federal petition;<sup>2</sup> (2) he may  
25 amend the petition to dismiss the unexhausted issue, and proceed with those which are

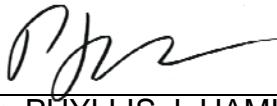
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27 <sup>2</sup> This option is more apparent than real, because any subsequent federal petition  
28 would almost certainly be barred by the statute of limitations.

1 exhausted;<sup>3</sup> or (3) he may ask for a stay of this case while he returns to state court to  
2 attempt to exhaust the five unexhausted issues, then, if unsuccessful in state court, return  
3 here and ask that the stay be lifted. If he chooses the third option, asking for a stay, he  
4 must show "good cause" for his failure to exhaust sooner, that the issue is "potentially  
5 meritorious," and that he has not engaged in "dilatory litigation tactics." See *Rhines v.*  
6 *Weber*, 544 U.S. 269, 277 (2005).

7 3. Petitioner must elect one of the three choices set out in section three within thirty  
8 days of the date this order is entered. If he does not, this case will be dismissed.

9 **IT IS SO ORDERED.**

10 Dated: May 20, 2008.

  
11 PHYLLIS J. HAMILTON  
United States District Judge

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27 <sup>3</sup> If he chooses this option he probably will not be able to file a future federal petition  
28 containing the five unexhausted issues, because second federal petitions are generally barred  
by 28 U.S.C. § 2244(b)(2).